Supreme Court, U.S.
FILED

96 556 SEP 30 1996

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1996

State of Arkansas, *Petitioner,*

v.

Donnietha Bradford, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

WINSTON BRYANT
Arkansas Attorney General

Of Counsel:

ANDREW D. LEIPOLD
University of Illinois
College of Law
504 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 333-0931

BY: VADA BERGER
*DAVID R. RAUPP
Assistant Attorneys General
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, AR 72201
(501) 682-2007

Attorneys for Petitioner
*Counsel of Record

PARAGON PRINTING & STA., 311 East Capitol Avenue, Little Rock, AR 72201 (501) 374-1943

RECEIVED
OCT - 7 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

38 pp

QUESTION PRESENTED

Does the Sixth Amendment to the United States Constitution or this Court's decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), prohibit police-initiated questioning of indigent criminal defendants after arraignment or other similar proceeding when those defendants have never requested counsel or otherwise indicated a desire to have counsel present, but who nevertheless have had counsel appointed for them?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. There Is A Conflict Between The Arkansas Supreme Court's Decision And The Decisions Of Other State And Federal Courts 7

II. The Question Of Whether An Accused Must Affirmatively Invoke The Right To Counsel Is An Important One Which Should Be Answered By This Court 10

III. The Arkansas Supreme Court Misinterpreted The Sixth Amendment 13

CONCLUSION 16

APPENDIX

Slip Opinion in *Bradford v. State*, 325 Ark. 278 (1996) ... A-1

Arkansas Rule of Criminal Procedure 8.2 and Accompanying Commentary A-14

TABLE OF AUTHORITIES

CASES PAGE

Arizona v. Evans, 115 S. Ct. 1185 (1995) 6

Arizona v. Roberson, 486 U.S. 675 (1988) 12

Davis v. United States, 114 S. Ct. 2350 (1994) 12

Dew v. United States, 558 A.2d 1112 (D.C. 1989) 8

Edwards v. Arizona, 451 U.S. 477 (1981) 11, 12, 13

Fare v. Michael C., 442 U.S. 707 (1979) 12

Faretta v. California, 422 U.S. 806 (1975) 14

Farrell v. State, 181 Ill. App.3d 446, 536 N.E.2d 476, 129 Ill. Dec. 636, *cert. denied*, 493 U.S. 872 (1989) 9

Fleming v. Kemp, 837 F.2d 940 (11th Cir. 1988)(per curiam), *cert. denied*, 490 U.S. 1028 (1989) 9

Holloway v. State, 780 S.W.2d 787 (Tex. Crim. App. 1989) (en banc) 8, 11

Lanes v. State, 53 Ark. App. 266, 922 S.W.2d 349 (1996) ... 6

McMonagle v. Northeast Women's Center, Inc., 493 U.S. 901 (1989) 9

McNeil v. Wisconsin, 501 U.S. 171 (1991) 7, 13

Michigan v. Harvey, 494 U.S. 344 (1990) 7, 13

Michigan v. Jackson, 475 U.S. 625 (1986) ..... *passim*

Michigan v. Long, 463 U.S. 1032 (1983) 6

Minnick v. Mississippi, 498 U.S. 146 (1990) 7

Miranda v. Arizona, 384 U.S. 436 (1966) 12, 13, 15

Montoya v. Collins, 955 F.2d 279 (5th Cir.), *cert. denied*, 506 U.S. 1036 (1992) 8, 9

Moore v. State, 323 Ark. 529, 915 S.W.2d 284 (1996) 6

Moran v. Burbine, 475 U.S. 412 (1986) 7, 14

Patterson v. Illinois, 487 U.S. 285 (1988) 11

State v. Carter, 664 So.2d 367 (La. 1995) 8

State v. Hattaway, 621 So.2d 796 (La. 1993) 8

Stokes v. Singletary, 952 F.2d 1567 (11th Cir. 1992) 8

Sutherland v. State, 299 Ark. 86, 771 S.W.2d 264 (1989) (per curiam) 5

Sutton v. State, 262 Ark. 492, 559 S.W.2d 16 (1977) 6

United States ex rel. Farrell v. Haws, 739 F. Supp. 1237 (C.D. Ill. 1990) 10

United States v. Rodriguez, 993 F.2d 1170 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1547 (1994) 8

United States v. Rodriguez, 888 F.2d 519 (7th Cir. 1989) 9

United States v. Scarpa, 897 F.2d 63 (2d Cir.), *cert. denied*, 498 U.S. 816 (1990) 10

Wilcher v. Hargett, 978 F.2d 872 (5th Cir. 1992), *cert. denied*, 510 U.S. 829 (1993) 8

Wilson v. Murray, 806 F.2d 1232 (4th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987) 9

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution 11, 12, 13, 15

Sixth Amendment to the United States Constitution ..... *passim*

STATUTES AND RULES

28 U.S.C. § 1257(a) 1

Arkansas Rule of Criminal Procedure 8 ..... 5, 6

OTHER AUTHORITIES

1987 Unofficial Supplementary Commentary to Rule 8.2 of the Arkansas Rules of Criminal Procedure 6

Comment to Rule 8.2 of the Arkansas Rules of Criminal Procedure 6

William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761 (1989) 12

H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Colum. L. Rev. 1137 (1987) 12

In the

Supreme Court of the United States

OCTOBER TERM, 1996

State of Arkansas, *Petitioner,*

v.

Donnietha Bradford, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

The State of Arkansas respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 325 Ark. 278. Appendix at A-1-A-13.

JURISDICTION

The Arkansas Supreme Court entered its judgment in this case on July 8, 1996. Appendix at A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A relative of seventy-nine-year old Lester Frazier went to his house in the early morning hours of June 1, 1994, to pick him up for an overseas trip Frazier was planning to take. (R. 205-07) Not only was Frazier not at home when his relative arrived, but his house had been broken into, ransacked, and had considerable amounts of blood throughout it. (R. 207-09) Three days later, on June 4, 1994, fishermen found Frazier's body in the Mississippi River near Osceola, Arkansas. (R. 366) An autopsy of his body revealed that he had died after receiving numerous blunt-force injuries to his head and right hand. (R. 458)

Police arrested Donnietha Bradford on Friday, July 22, 1994, in connection with Frazier's murder. (R. 282) That same evening, Detectives Bryan Crites and Marvin Crawford sought to question Bradford and, at 6:20 p.m., she executed a waiver-of-rights form which, among other things, advised her of her right to remain silent and to have an attorney present during questioning by police. (State's Exhibit 28) Later that

night, Bradford gave a taped statement to the Detectives. (State's Exhibit 29 at 13) She began the statement by confirming that she had read the waiver-of-rights form and understood it. (State's Exhibit 29 at 13) She then implicated a man named Rodney Barnett in the murder, aggravated robbery, and kidnapping of Frazier, but did not implicate herself. (State's Exhibit 29 at 4-5, 9-10)

About one hour after she gave the first statement, Bradford gave Detectives Crites and Crawford a second taped statement lasting about twenty minutes. (State's Exhibit 30 at 1, 17) This second statement also began with Bradford's assurance that she understood her rights, but had waived them. (State's Exhibit 30 at 1) During the course of this statement, Bradford again implicated Rodney Barnett, but she also admitted that she loaned him a pistol, saw him cutting the front screen door on Frazier's home, and saw him leave in a car with Frazier. (State's Exhibit 30 at 5, 7, 8, 12) She denied, however, that she participated in the crimes in any way. (State's Exhibit 30 at 16-17)

On Monday, July 25, 1994, Bradford appeared before the Blytheville Municipal Court. (Defendant's Exhibit 1) The court found that there was probable cause to detain her, set bond in the amount of $100,000, and, although no particular lawyer was named, appointed the local public defender to represent her. (Defendant's Exhibit 1) Bradford was not aware that a lawyer had been appointed to represent her. (R. 309, 346) After the probable-cause hearing, Detectives Crites and Crawford again approached Bradford. (R. 289-90, 299) Before questioning began, she was again informed that she had the right to an attorney, and she again executed another waiver-of-rights form. (State's Exhibit 31) During the interview, Bradford gave a third statement in which she again implicated Rodney Barnett in the crimes against Frazier. (State's Exhibit 32 at 2-5) In this statement, she admitted being inside Frazier's home and helping Barnett. (State's Exhibit 32 at 3-4) She denied, however, that she was a willing participant, claiming that Barnett forced her to help him and that he alone killed Frazier. (State's

Exhibit 32 at 3-5) This statement concluded with Bradford confirming that it was made freely and voluntarily. (State's Exhibit 32 at 6)

On December 1, 1994, the prosecuting attorney for Mississippi County filed an information charging Bradford with the capital murder, aggravated robbery, and kidnapping of Lester Frazier. (R. 4) Before trial, Bradford filed a motion seeking the suppression of any statement "if it is found that it was obtained involuntarily from the defendant or taken in violation of the [Arkansas Rules of Criminal Procedure], the Fifth and Fourteenth Amendments of the [United States] Constitution and the Arkansas Constitution." (R. 52) At the suppression hearing, Bradford also argued that all three of her statements should be suppressed because they were taken in violation of the Sixth Amendment. (R. 270) During that hearing, Detectives Crites and Crawford both testified that they did not know that an attorney had been appointed for Bradford and that she never asked for an attorney. (R. 281, 290, 287, 289, 274, 285) Bradford testified that she read and signed the waiver-of-rights forms and that she freely made all three statements. (R. 306-07, 310-11) She also testified that she did not know that the municipal judge had appointed an attorney for her, although she claimed to have asked for one before the taping of her first statement. (R. 309, 302)[1]

The trial court denied Bradford's motion to suppress the first two statements, concluding that she understood her rights, waived them, and gave voluntary statements free from coercion. (R. 344-45) The court found that while she and the Detectives did not know it, an attorney had been appointed for her before she gave her third statement in response to police-initiated questioning. (R. 345-46) Because it found that she had knowingly, intelligently, and voluntarily waived her right to

---

[1]This claim was resolved against Bradford at the trial level as specifically noted by the Arkansas Supreme Court. Appendix at A-7.

counsel, however, the court refused to suppress the third statement. (R. 349) All three statements were then admitted into evidence at trial, and the jury found Bradford guilty of the capital murder, aggravated robbery, and kidnapping of Lester Frazier, for which she received life imprisonment without the possibility of parole. (R. 381-400, 402-27, 428-39, 524-26)

In an opinion issued on July 8, 1996, the Arkansas Supreme Court reversed Bradford's convictions, concluding that her third statement to the police should have been suppressed because her Sixth Amendment right to counsel had been violated by police-initiated questioning occurring after the appointment of counsel. The Court recognized that Bradford's case differed from *Michigan v. Jackson*, 475 U.S. 625 (1986), because she never actually requested counsel. Appendix at A-9. Despite this distinction, however, the Court found *Jackson* controlling, relying on footnote 6 of that opinion which states that the right to counsel is not dependent upon a request. The Court found further support for its construction of the Sixth Amendment in its own decision of *Sutherland v. State*, 299 Ark. 86, 771 S.W.2d 264 (1989)(per curiam), in which it had held that police-initiated questioning after counsel has been appointed violates the Sixth Amendment. Finally, the Court also stated that "Rule 8 of the Arkansas Rules of Criminal Procedure dictates a reversal in this case." Appendix at A-12.[2]

---

[2]The Arkansas Supreme Court's discussion of Rule 8 does not provide an adequate and independent state ground insulating its Sixth Amendment decision from this Court's review. The Court recently reaffirmed its position that in the absence of a clear statement on the face of a state-court opinion that that court rested its decision on an adequate and independent state ground, and, instead, from the opinion it can be said the "decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," the Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law

required it to do so." *Arizona v. Evans*, 115 S. Ct. 1185, 1189 (1995)(quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983))(quotations omitted).

The Arkansas Supreme Court's reference to Rule 8 falls short of being a clear statement that the Court rested its decision on a state-law ground. That the Court considered its judgment to be woven of Sixth Amendment cloth is evidenced in at least three ways. First, in the opening paragraph of its opinion the Court noted (without any reference to state law) that it was reversing Bradford's convictions on Sixth Amendment grounds. Appendix at A-1. Second, at the conclusion of its Sixth Amendment analysis, the Court expressly overruled a decision of the Arkansas Court of Appeals, *Lanes v. State*, 53 Ark. App. 266, 922 S.W.2d 349 (1996), which rested upon Sixth Amendment grounds. Appendix at A-12. Third, its reference to Rule 8 came only after its comparatively lengthy Sixth Amendment discussion, holding, and overruling of *Lanes*. Appendix at A-12-A-13.

Moreover, the Arkansas Supreme Court has elsewhere suggested that its interpretations of Rule 8 are grounded in federal "constitutional safeguards." *Sutton v. State*, 262 Ark. 492, 495, 559 S.W.2d 16, 18 (1977); *see also* Comment to Rule 8.2 and 1987 Unofficial Supplementary Commentary to Rule 8.2 (noting that Rule 8 has constitutional dimensions; reprinted at Appendix A-14-A-15); *cf. Moore v. State*, 323 Ark. 529, 543, 915 S.W.2d 284, 292 (1996)(noting that Rule 8 and Sixth Amendment arguments could not be raised for first time on appeal because the Court "will not consider even constitutional arguments not raised before the trial court[ ]").

REASONS FOR GRANTING THE WRIT

The question this petition presents is whether an uncoerced confession taken after the accused was appointed counsel should be suppressed, even though the accused never expressed the desire to deal with the police only through counsel and, in fact, knowingly, intelligently, and voluntarily waived her right to counsel. In *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (citations and quotations omitted), this Court recognized that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," and that "[a]dmissions of guilt resulting from valid . . . waivers . . . are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *See also Minnick v. Mississippi*, 498 U.S. 146, 166-67 (1990)(Scalia, J., dissenting); *Moran v. Burbine*, 475 U.S. 412, 426 (1986).

The rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), which protects the Sixth Amendment right to counsel is not, in and of itself, a constitutional requirement that diminishes the value and importance of confessions. Instead, that rule is designed to protect its constitutional antecedent. *See generally Michigan v. Harvey*, 494 U.S. 344, 348-52 (1990). An extension of the *Jackson* rule to cases like this one will cut off legitimate police questioning about crimes and uncoerced confessions as a result of that questioning without any indication from defendants that they wish to have a lawyer present or that they are unwilling to speak to the police. Nothing in the Sixth Amendment requires this result.

I. There Is A Conflict Between The Arkansas Supreme Court's Decision And The Decisions Of Other State And Federal Courts.

The Arkansas Supreme Court concluded that the mere appointment of counsel by a court is the constitutional equivalent of invocation by the accused of the right to counsel.

Lower courts are in sharp disagreement on this issue. At least two state courts have reached holdings similar to the one the Arkansas Supreme Court reached in this case. *See Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989)(concluding appointment is the equivalent of invocation); *Holloway v. State*, 780 S.W.2d 787, 790, 795 (Tex. Crim. App. 1989)(en banc) (concluding that, although appointment is not invocation, appointment otherwise bars police questioning). One federal court has suggested that when counsel has been appointed at an initial appearance, the issue of whether the defendant requested counsel or had counsel appointed is "a distinction without a difference." *Stokes v. Singletary*, 952 F.2d 1567, 1579 (11th Cir. 1992).

Other courts, however, have held directly contrary to the Arkansas Supreme Court. *See, e. g., State v. Carter*, 664 So.2d 367, 379-80 & n.12, 383-84, 387 (La. 1995)(public defender appointed at initial appearance, no invocation found; overruling *State v. Hattaway*, 621 So.2d 796 (La. 1993)). The most complete reported analysis from the federal courts comes from Judge Edith Jones, writing for the Fifth Circuit, in *Montoya v. Collins*, 955 F.2d 279 (5th Cir.), *cert. denied*, 506 U.S. 1036 (1992). In that case, the Court concluded that a defendant who stood mute as counsel was appointed for him had not invoked his Sixth Amendment right to counsel and thus a subsequent waiver of that right was not invalid under *Jackson*. *Montoya*, 955 F.2d at 282-83; *see also Wilcher v. Hargett*, 978 F.2d 872, 876 (5th Cir. 1992), *cert. denied*, 510 U.S. 829 (1993)(applying *Montoya*); *but see United States v. Rodriguez*, 993 F.2d 1170, 1174 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1547 (1994)(finding that waiver made after appointment of counsel was invalid, without citing *Montoya*).

Like Bradford, Montoya was appointed counsel at a municipal-court proceeding of which no transcript was made, but from later testimony about the proceeding, it is clear that he did not request counsel. *Montoya*, 955 F.2d at 282 & n.2. Without a request for counsel, the Fifth Circuit concluded that

Montoya could later validly waive his Sixth Amendment right to counsel. According to the Court, to hold otherwise would wrongly "extend the prophylactic rule of Jackson[,]" because it would ignore the significance of a request for counsel which this Court had relied upon in *Jackson* itself. *Montoya*, 955 F.2d at 283-84.

Additionally, the Court in *Montoya* discussed a Seventh Circuit decision on which Montoya relied, *United States v. Rodriguez*, 888 F.2d 519 (7th Cir. 1989). In that case, Judge Easterbrook reasoned that a defendant might be said to have been appointed counsel without having asked for it for *Jackson* purposes. He found it highly unlikely, however, that a defendant would be appointed a lawyer without asking for one and even suggested that if a defendant were appointed counsel it would be a fair inference (particularly from a silent record) that counsel was requested. *Rodriguez*, 888 F.2d at 525-26. The *Montoya* Court concluded that the inference suggested by the silent record in *Rodriguez* could offer no comfort to Montoya because his own record was not silent, and, instead, reflected that he had not requested counsel when counsel was appointed. *Montoya*, 955 F.2d at 284-85.

Finally, lower courts also disagree on the closely related point as to whether defendants who indicate to a judicial officer that they will retain counsel have thereby invoked their Sixth Amendment right for purposes of *Jackson*. Justice White in dissent from the denial of certiorari in *McMonagle v. Northeast Women's Center, Inc.*, 493 U.S. 901, 905 (1989), identified this divergence of opinions by citing *Fleming v. Kemp*, 837 F.2d 940, 947 (11th Cir. 1988)(per curiam), *cert. denied*, 490 U.S. 1028 (1989)(statement that counsel would be retained was *Jackson* invocation); *Wilson v. Murray*, 806 F.2d 1232, 1235 (4th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987)(same); and *Farrell v. State*, 181 Ill. App.3d 446, 450-52, 536 N.E.2d 476, 479-80, 129 Ill. Dec. 636, 639-40, *cert. denied*, 493 U.S. 872 (1989)(statement that counsel would be retained was not *Jackson* invocation). Since then, the United States District Court

for the Central District of Illinois has agreed with the Illinois Court of Appeals in *Farrell* by holding that merely stating that one will retain counsel is not an invocation of counsel for *Jackson* purposes. *United States ex rel. Farrell v. Haws*, 739 F. Supp. 1237, 1240-44 (C.D. Ill. 1990); *cf. United States v. Scarpa*, 897 F.2d 63, 68-70 (2d Cir.), *cert. denied*, 498 U.S. 816 (1990)(statement to police that counsel would be retained not *Jackson* invocation).

As a result of these inconsistent decisions, law-enforcement officers in neighboring jurisdictions are left with different interpretations of the Sixth Amendment and resulting differing effects from a defendant's waiver of the right to counsel for purposes of post-arraignment questioning. Neither the police nor criminal defendants should suffer different interpretations of *Jackson*'s protection of Sixth Amendment rights due to geographic boundaries. The importance of uncoerced confessions to the criminal-justice system is undermined if a state line determines whether such confessions can be admitted into evidence and calls for one rule. The Court should grant the petition to resolve the conflict of authority and make the law uniform.

II. The Question Of Whether An Accused Must Affirmatively Invoke The Right To Counsel Is An Important One Which Should Be Answered By This Court.

Several Supreme Court cases are relevant to this question, but they have not clearly answered it. In *Jackson*, 475 U.S. at 636, for example, the Court summarized its holding as follows:

> if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Despite this language requiring the accused to invoke the right to counsel, the Court also stated in footnote 6 of its opinion that

it was not "suggest[ing] that the right to counsel turns on such a request." *Id.*, 475 U.S. at 633 n.6. Any ambiguity in the Court's opinion on this point, however, was arguably resolved in *Patterson v. Illinois*, 487 U.S. 285 (1988). In *Patterson*, the Court explained that its holding in *Jackson* "turned on the fact that the accused ha[d] *asked* for the help of a lawyer in dealing with the police." *Patterson*, 487 U.S. at 291 (quotations omitted; emphasis added).

While *Patterson* arguably settles the importance of an accused's request for counsel, it too contains ambiguous language. In footnote 3 of that opinion, the Court stated that it was

> a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.

Id., 487 U.S. at 290 n.3. This language could be construed to mean that the mere appointment of a lawyer bars future police-initiated questioning, as the Arkansas Supreme Court held. *See also Holloway*, 780 S.W.2d at 794-95. Yet, the language does not definitively answer the question, particularly in a case such as Bradford's because she did not even know that a lawyer had been appointed for her.

The need for bright-line rules in this area is evident. The Court based its Sixth Amendment holding in *Jackson* on its Fifth Amendment decision in *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Edwards*, the Court held that once "an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established" by a subsequent waiver obtained during police-initiated questioning. *Id.*, 451 U.S. at 484. The Court has repeatedly emphasized that its rule requiring law-enforcement officers to cease interrogation once a suspect has requested counsel has

> the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.

Fare v. Michael C., 442 U.S. 707, 718 (1979); *see also Arizona v. Roberson*, 486 U.S. 675, 681 (1988).

Despite the bright-line advantages of *Edwards*, the Court has continued to refine its contours in recognition of the importance of clarifying for police officers, prosecutors, and courts how suspects subject to custodial interrogation can invoke their Fifth Amendment derived right to counsel. In the recent case of *Davis v. United States*, 114 S. Ct. 2350, 2355-56 (1994), for example, the Court held that police officers do not have to stop questioning suspects who make an ambiguous request for counsel after they have knowingly and voluntarily waived their rights consistent with *Miranda v. Arizona*, 384 U.S. 436 (1966). Just as *Davis* explained the clarity with which a request for Fifth Amendment counsel must be made for *Edwards* purposes, it is now necessary for the Court to explain how an accused requests Sixth Amendment counsel for *Jackson* purposes.

The Court should do so particularly to resolve the apparent contradictions in extending the Fifth Amendment principles outlined by *Edwards* into the Sixth Amendment context, as described both by the original dissenters in *Jackson* and by later commentators. *See Jackson*, 475 U.S. at 637-42 (Rehnquist, J., dissenting)(noting that the majority opinion "provides no satisfactory explanation for its decision to extend the *Edwards* rule to the Sixth Amendment[ ]"); *see also, e.g.*, William J. Stuntz, *Waiving Rights in Criminal Procedure,* 75 Va. L. Rev. 761, 837 (1989)(explaining that Sixth Amendment "doctrine appears to be incoherent" and declaring that "[t]his chaos calls for some sort of explanation[ ]"); H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint,* 87 Colum. L. Rev. 1137, 1184-90 (1987). Moreover, the Court has recognized that

there is no "equivalence in fact between invocation of the Sixth Amendment right to counsel and the expression necessary to trigger *Edwards*." *McNeil*, 501 U.S. at 179. This is no doubt due to the fact that individuals whose Sixth Amendment right to counsel has attached can assert that right not only to officers conducting custodial interrogation (as in the Fifth Amendment context), but also to judges conducting arraignments. *See Jackson*, 475 U.S. at 634. The Court should grant the petition and answer the important question of how an accused invokes the Sixth Amendment right to counsel.

III. The Arkansas Supreme Court Misinterpreted The Sixth Amendment.

The Arkansas Supreme Court erred by holding that the mere appointment of counsel is an invocation by an accused of the Sixth Amendment right to counsel. An *invocation* of that right surely requires some affirmative act by the *accused* to give effect to the *Jackson* prophylactic rule invalidating a subsequent waiver of the right. The very reason for the prophylactic rule created in *Jackson* is that while criminal defendants may validly waive their Sixth Amendment rights, they may not do so if the police initiate questioning following an earlier invocation of those rights. *See Harvey*, 494 U.S. at 349-52. The irrebuttable presumption is that once defendants invoke their rights, they would not surrender them unless overborne by the police. *Id.*

Despite this presumption, however, nothing in this Court's jurisprudence dictates the Arkansas Supreme Court's conclusion that mere appointment may serve as an invocation of the Sixth Amendment right to counsel. *See Jackson*, 475 U.S. at 640-42 (Rehnquist, J., dissenting). Without an earlier affirmative request or demand from a defendant that he or she wants to deal with police only through counsel, there is no reason to suspect that a waiver of that right is invalid because the defendant was somehow overborne by police-initiated questioning. A defendant's silence at the time counsel is appointed, combined

with a waiver following *Miranda* warnings at the time of questioning, in fact, suggests the opposite.

This is particularly true in a case like Bradford's. After her arrest, she twice waived her right to have a lawyer present and spoke to the police about her crimes on July 22 and 23, 1994. She then waived that right a third time and spoke to the police about her crimes on July 25, 1994, after she had been appointed counsel at her probable-cause hearing. She never gave any indication to any state actor that she was unwilling to speak to the police except through counsel. The Arkansas Supreme Court should not have invalidated her waiver of her Sixth Amendment right to counsel without any indication by her that she wanted an attorney to act as the medium between her and the State.

Neither the Sixth Amendment nor *Jackson* itself provides a rationale for extending the *Jackson* prophylactic rule to mere appointment as the Arkansas Supreme Court did in this case. First, the Sixth Amendment cannot be said to require such a result. While the right to counsel assures that defendants have the assistance of counsel when the "government's role shifts from investigation to accusation[,]" the Sixth Amendment right does not protect them "from the consequences of [their] own candor." *Moran*, 475 U.S. at 430-31. The appointment-as-invocation rule oddly insulates the Sixth Amendment right to counsel from the defendants themselves by precluding waiver of the right in the absence of defendant-initiated contact. Unless defendants first rejected the appointment of counsel, they could never later waive their Sixth Amendment rights without initiating contact with the police on their own. Whatever attraction such a forced right to counsel has by virtue of protecting defendants from themselves, it is not the right found in the Sixth Amendment. That right belongs to defendants and is not the State's to impose upon them simply by appointment. *Cf. Faretta v. California*, 422 U.S. 806 (1975)(forcing a defendant to go to trial with a lawyer violates the Sixth Amendment).

Second, *Jackson* itself does not compel equating appointment

with invocation. While footnote 6 of *Jackson*, upon which the Arkansas Supreme Court relied, disavows the "suggest[ion] that the right to counsel turns on . . . a request[,]" the Court explained the scope of that proposition later in the same footnote by stating that an affirmative request for counsel is "an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation." *Jackson*, 475 U.S. at 633 n.6. Thus, while the *existence* of the right may not turn on a request for a lawyer, the *invocation* of that right does turn on such a request (as in the Fifth Amendment context). Indeed, when concluding that the defendants' waiver of their right to counsel during police-initiated questioning was invalid, the only fact the Court relied upon was the defendants' prior assertion, at their arraignment, of their right to counsel. *Id.*, 475 U.S. at 636; *see also id.*, 475 U.S. at 641 (Rehnquist, J., dissenting).

Without some indication from the accused that she wishes to deal with the State only through counsel, she should be allowed to respond to police-initiated questioning until she chooses to cut it off. If defendants want to speak to police about the State's accusations only through counsel, they can tell that to any state actor, particularly to police officers when receiving *Miranda* warnings. Once they do so, police may not thereafter initiate questioning. The Arkansas Supreme Court's conclusion to the contrary is unsupported by the Sixth Amendment right to counsel and this Court's cases explaining how a criminal defendant must invoke it and may waive it under *Jackson*. The Court should grant the petition to correct the judgment of the Arkansas Supreme Court.

CONCLUSION

For the reasons and authorities set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WINSTON BRYANT
Arkansas Attorney General

Of Counsel:

ANDREW D. LEIPOLD
University of Illinois
College of Law
504 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 333-0931

BY: VADA BERGER
*DAVID R. RAUPP
Assistant Attorneys General
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, AR 72201
(501) 682-2007

Attorneys for Petitioner
*Counsel of Record

APPENDIX

SUPREME COURT OF ARKANSAS

No. CR 96-5

Opinion Delivered JUL 08 1996

DONNIETHA BRADFORD,
APPELLANT,

V.

STATE OF ARKANSAS,
APPELLEE,

APPEAL FROM THE MISSISSIPPI COUNTY CIRCUIT COURT,
NO. CR 94-373
HON. SAMUEL TURNER, JUDGE,

REVERSED AND REMANDED.

ROBERT L. BROWN, Associate Justice

Appellant Donnietha Bradford contests her convictions for capital murder, kidnapping, and aggravated robbery and her sentence of life imprisonment without parole. She argues insufficiency of the evidence, breach of Fifth and Sixth Amendment rights as they pertain to her statements to police, and failure of the trial court to give certain instructions to the jury relating to termination of her accomplice status. Because we conclude that her Sixth Amendment rights were violated in connection with her third statement to police officers, we reverse the convictions and remand for a new trial.

On June 1, 1994, Blytheville police officers were called to the house of Lester Frazier. When they arrived at the house, they found that it had been ransacked, that there was considerable blood on the premises, and that Frazier, a

79 -year-old man, was missing. Three days later, Frazier's body was discovered in the Mississippi River south of Osceola. According to the medical examiner, Frazier's death was due to a fractured skull caused by a blunt force. Defensive wounds were found on Fraizer's right hand.

On Friday, July 22, 1994, Donnietha Bradford was arrested in connection with Frazier's murder. She was instructed of her *Miranda* rights, and she executed a waiver of rights form at 6:20 p.m. that same Friday. A recorded statement was taken more than four hours later. In that statement, she related that she had a conversation with Rodney Barnett on May 24, 1994, at an Arby's restaurant in Blytheville. She stated that Barnett asked her if she planned to rob Frazier. She informed him that if she had intended to rob Frazier, she would have done so. Barnett replied, "I'll get him". Barnett told her that he knew Frazier's family and that the family had money.

A week later, Barnett told her that he killed the old man, but gotten no money. She stated that Barnett told her that he cut the screen on Frazier's door and that when Frazier opened the door, he knocked him down. He proceeded to hit Frazier over the head and ask where his money was. Barnett ransacked the house looking for the money, but he could not find it. At that point, he walked across the street to his father's house and got his car. He forced Frazier into the car and drove him to the river. Once they arrived at the river, Barnett took a rock and repeatedly hit Frazier over the head with it. According to her statement, about a month later, she visited with Barnett at Coleman's Combo in Blytheville. Barnett inquired if Bradford had said anything to anybody about the murder. When she answered "no," he said he wanted to keep it that way. He patted his waistband, indicating that he had a gun.

Approximately an hour and a half after the first interview, the police officers renewed their questioning of Bradford. Bradford gave a second statement in which she added that she had borrowed a pistol from an acquaintance, Frankie Milton, the night before Frazier was murdered. The pistol was inoperable

because the cylinder was "broken off."[1] She stated that she borrowed the pistol because she had been threatened by another man. She stated that the next day she talked with Barnett, and she let him borrow the gun. Barnett told her that he had been watching Frazier's house because he was going to rob him. He asked Bradford if she was going to go with him, and she answered that she did not know. Thirty minutes later, they walked to Frazier's house. She saw Barnett approach the front door and begin to cut the screen so that he could unlatch the door. At that point, Bradford left, she stated, because she did not want to rob the man. Later, she returned to Frazier's house to see what Barnett was doing. She stated that she saw the screen door wide open and the front door cracked open. A few minutes later, the door slammed and Barnett began turning the lights off in the house. She walked back down the street and returned to Frazier's house in her car. She saw Barnett put Frazier into the front seat of his car, which he had backed into the driveway. Barnett then drove away with Frazier.

The next day, she saw Barnett, and he told her that he had killed Frazier. He then gave her a detailed account of the murder which tracked the description that Bradford gave in her earlier statement to the police officers. She added that he told her that he had left the gun he had borrowed from her at the river, but that he would retrieve it. Bradford denied helping transport Frazier to the river. She also denied leaving the gun at the river, acting as a lookout for Barnett, and entering Frazier's house.

On Monday, July 25, 1994, a hearing to determine whether there was probable cause to detain Bradford was held before the Blytheville Municipal Court. Following the hearing, an affidavit for probable cause was issued, bond was set, and the public defender's office was appointed to represent her. Appointment of counsel was noted by the court on the affidavit for probable cause. Shortly after her appearance, another waiver

---

[1]According to Frankie Milton, the firing pin was missing, and the chamber would not open.

of *Miranda* rights was executed by Bradford, and police officers renewed their questioning of her. At about 6:45 p.m., Bradford gave a more detailed account of the events of May 31, 1994. Her statement was similar to the previous statements, except that in this statement she added that Barnett forced her at knifepoint to search Frazier's house for money. He further pretended to threaten her with the disabled gun in order to scare Frazier. Barnett stated that he was going to take Frazier to the bank to get some money. When Barnett left to get his car, he ordered Bradford to watch Frazier, and she did so. She saw Barnett hit Frazier on the head, and she saw that his head was bloody. She left the house after Barnett drove away with Frazier in the car.

Bradford was eventually charged with the capital murder, aggravated robbery, and kidnapping of Frazier. Prior to trial, Bradford moved to suppress her three statements to police officers. At the *Denno* hearing conducted during the course of the trial, the trial court denied her motion and allowed all three statements to be introduced into evidence. Following a jury trial, the jury returned a verdict of guilty on all three counts, and Bradford was sentenced to life in prison without parole.

I. Insufficient Evidence

We first address Bradford's claim that there was insufficient evidence to support the verdict. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Passley v. State*, 323 Ark. 301, 915 S.W.2d 248 (1996); *Williams v. State*, 321 Ark. 635, 906 S.W.2d 677 (1995). Preservation of an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of trial errors. *Passley v. State, supra; Davis v. State*, 319 Ark. 460, 892 S.W.2d 472 (1995). Accordingly, this court must address a challenge to the sufficiency of the evidence prior to considering an appellant's other assignments of trial error. *Passley v. State, supra; Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

When reviewing the sufficiency of the evidence on appeal, this court does not weigh the evidence but simply determines whether the evidence in support of the verdict is substantial. *Passley v. State, supra.* Substantial evidence is that which is forceful enough to compel a conclusion one way or the other and pass beyond mere suspicion and conjecture. *Id.* In determining whether there is substantial evidence, we review the evidence in the light most favorable to the state, and it is permissible to consider only that evidence which supports the guilty verdict. *Id.* Further, circumstantial evidence may constitute substantial evidence when every other reasonable hypothesis consistent with innocence is excluded. *Id.* Whether a reasonable hypothesis exists is for the trier of fact to resolve. *Id.*

At trial, Bradford made the following arguments for her motion for a directed verdict: On the capital murder charge she argued that the State failed to prove that she acted alone or with others in causing the death of Frazier in the furtherance of a robbery. As to the aggravated robbery charge, she argued that there was no evidence that she threatened or employed force or that she was armed with a deadly weapon. With respect to the kidnapping charge, she contended there was no evidence to support the claim that she restrained the victim in any way.

The State urges that Bradford has changed her argument on appeal in that she now argues she was forced to participate in the robbery and that she never agreed to participate in the crimes. The State adds that this argument is, in reality, not an argument regarding the sufficiency of the evidence to support the conviction but is, rather, an argument that her participation was the result of duress, which requires an acquittal. We disagree with the State. Bradford maintains that the only evidence presented to prove her complicity is her third statement to police officers that she was forced to participate in the crimes and that that evidence is not valid evidence to show that she was an accomplice to the crimes. Accordingly, her argument continues to be that the State's evidence was inadequate to sustain the

convictions.

The keystone of the State's case against Bradford was her third statement to police officers. Putting aside for the moment the legitimacy and propriety of that third statement, we hold that the State presented substantial evidence for the jury to find that she committed the crimes. Discounting her duress defense, there was evidence that she discussed the planning of the crime with Barnett, that she loaned him a pistol to use, that she entered Frazier's house with Barnett, that she was present when Barnett initially struck Frazier on the head, that she searched the house for money, that she watched Frazier while Barnett left to get his car, and that Frazier's head was bleeding when he left the house. There was also much blood on the premises evidenced by photographs which showed the severity of the beating.

The jury did not have to believe Bradford's contention that she acted only out of duress. The jury could reasonably have believed that she voluntarily participated in the robbery attempt, that she voluntarily restrained the victim prior to his kidnapping by Barnett, and that her actions culminated in Frazier's death. Indeed, the jury could well have concluded that the fatal head injury occurred at Frazier's house. Cause of death was a fractured skull, and Frazier's head was bleeding when Barnett placed him in the car.

II. SUPPRESSION OF STATEMENTS

Bradford next argues that the trial court erred in denying her motion to suppress the three statements she gave to Blytheville police officers. She initially asserts that she requested an attorney prior to giving her first statement to the police officers but was denied counsel in violation of her Fifth Amendment rights. The investigating officers testified at the *Denno* hearing, however, that Bradford never requested an attorney. They stated, to the contrary, that she completed the waiver of rights form and that, from all appearances, she understood her rights.

In reviewing a trial court's decision concerning the voluntariness of a custodial statement, this court makes an independent determination based on the totality of the circumstances and does not reverse the trial court unless that court's ruling is clearly against the preponderance of the evidence. *Moore v. State,* 321 Ark. 249, 903 S.W.2d 154 (1995). When conflicting testimony concerning the circumstances of a confession is offered, it is within the trial court's province to weigh the evidence and resolve the credibility of the witnesses. *Id.* In the instant case, there was conflicting evidence on whether Bradford requested counsel prior to her statements. The trial court apparently did not find that she requested an attorney. We conclude that this ruling was not clearly erroneous.

Bradford's second suppression argument is that her third inculpatory statement taken after her probable cause hearing and appointment of counsel should have been suppressed as a result of a violation of her Sixth Amendment right to counsel. She points to the fact that she was arrested on Friday, July 22, 1994 and appeared before the Blytheville Municipal Court on the following Monday, July 25, 1994. At that appearance, the court determined that there was probable cause to support the charges against her. The court fixed bond and appointed the public defender's office to represent her. This action was memorialized in the court's affidavit of probable cause which was executed that same date. Bradford admitted at the *Denno* hearing that she was unaware that the court had appointed counsel for her. The investigating police officers also denied knowledge that Bradford had been appointed counsel. The trial court found, following the *Denno* hearing, that counsel had indeed been appointed for her prior to her third statement but that she had waived the right to counsel before giving that last statement.

The issue before us is whether the municipal court's appointment of counsel at the probable cause hearing curtailed subsequent police interrogation though neither police officers nor Bradford were aware of the appointment and though

Bradford waived her *Miranda* rights before the third interrogation. The United States Supreme Court addressed the Sixth Amendment right to counsel in *Michigan v. Jackson,* 475 U.S. 625 (1986). That case involved two consolidated cases. One defendant, Bladel, was arraigned on a murder charge and asked at his arraignment that an attorney be appointed for him because of his indigency. The Court appointed counsel and mailed a notice of the appointment to the law firm. Bladel was not told that counsel had been appointed. Before the notice was received, police officers interviewed Bladel and, after advising him of his *Miranda* rights, obtained a confession. Jackson, the other defendant, also asked that counsel be appointed for him during his arraignment on murder charges. The next day, before he had an opportunity to consult with counsel, police officers interviewed him and, again, after advising him of his rights under *Miranda,* obtained a confession. In both cases, the investigating officers were present at the arraignment.

The Michigan trial courts denied the defendants' motions to suppress, but the Michigan Supreme Court reversed. The United States Supreme Court affirmed that reversal. In its decision, the Court framed the pivotal issue by first stating that the Sixth Amendment provides the right to counsel at postarraignment interrogations which is a critical stage of the proceedings and signals the initiation of adversary judicial proceedings. The question then was whether the defendants effectively waived that right by executing a *Miranda* waiver after arraignment. In the course of its opinion, the Court stated:

> Indeed, after a formal accusation has been made -- and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment -- the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that

> might have been entirely proper at an earlier stage of their investigation.
>
> . . . .
>
> The State points to another factual difference: the police may not know of the defendant's request for an attorney at the arraignment. That claimed distinction is similarly unavailing. In the cases at bar, in which the officers in charge of the investigations of respondents were present at the arraignments, the argument is particularly unconvincing. More generally, however, Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

475 U.S. at 632, 634. The Court went on to hold that "[i]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 475 U.S. at 636.

What distinguishes this case from *Michigan v. Jackson, supra,* is that in this case, Bradford did not request counsel at her probable cause hearing, but nevertheless the public defender was appointed to represent her without her knowledge. Thus, must a defendant affirmatively invoke her Sixth Amendment right to counsel in order to be afforded the protections provided by *Michigan v. Jackson, supra*? In footnote 6 of *Michigan v. Jackson, supra,* the Court stated:

> In construing respondents' request for counsel, we do not, of course, suggest that the

> right to counsel turns on such a request. *See Brewer v. Williams,* 430 U.S. at 404 ("[T]he right to counsel does not depend upon a request by the defendant"); *Carnley v. Cochran,* 369 U.S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request"). Rather, we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation.

4[7]5 U.S. at 633.

We read *Michigan v. Jackson* to stand for the proposition that once the Sixth Amendment right to counsel attaches and once the defendant requests counsel, an ordinary waiver of *Miranda* rights will not suffice to validate a subsequent confession. The same principle should apply to appointed counsel, which is the situation that we have before us. The fact that Bradford was unaware that she was appointed counsel is irrelevant. We note in this regard that defendant Bladel in *Michigan v. Jackson, supra,* was similarly unaware. Moreover, police officers under *Michigan v. Jackson, supra,* are deemed to be aware of counsel's appointment through imputed knowledge. Once counsel was appointed by the court, knowledge of the appointment was imputed to police officers, and they were under an affirmative obligation to respect it. Just as a police officer who wishes to initiate an interrogation during the custody stage must determine if a request for counsel has been made *(Arizona v. Roberson,* 486 U.S. 675 (1985)), simple diligence requires that police officers take pains to learn whether counsel was appointed at a probable cause hearing.

The State relies on *Patterson v. Illinois,* 487 U.S. 285 (1988), to support its theory that Bradford waived her right to counsel

by executing the *Miranda* waiver prior to the third statement. It is true that in *Patterson,* the defendant was interrogated postindictment and signed a waiver-of-counsel form. But defendant had not requested counsel; nor had one been appointed for him. Thus, the Supreme Court held that the defendant's waiver in *Patterson* was knowing and intelligent under *Johnson v. Zerbst,* 304 U.S. 458 (1938). The critical fact, though, that did not exist in *Patterson* but exists in the instant case is that counsel had already been appointed for Bradford, and under *Michigan v. Jackson, supra,* knowledge of that fact was imputed to the police officers. The failure of police officers to learn about the appointment and obtain a statement from Bradford that she did not want appointed counsel present at the interrogation is what requires suppression in this case.

Case law in this state also militates in favor of suppression. In *Bussard v. State.* 295 Ark. 72, 747 S.W.2d 71 (1988), we held that once the Sixth Amendment right to counsel attached and once counsel had been retained, even if there had been no formal request at the probable cause hearing as in *Michigan v. Jackson,* a defendant enjoyed the right to rely on counsel as a medium between himself and the state. *See Maine v. Moulton,* 474 U.S. 159 (1985). More significantly, in *Sutherland v. State,* 299 Ark. 86, 771 S.W.2d 264 (1989)(per curiam), we held that once counsel had been appointed, any waiver in connection with police-initiated interrogation was invalid under *Michigan v. Jackson, supra,* and *Arizona v. Roberson, supra.* In the instant case, the Sixth Amendment right to counsel had clearly attached, and counsel had been appointed. Though Bradford never formally requested counsel, the court's appointment provided a medium between herself and investigating officers. Her mere waiver of *Miranda* rights could not equate to a waiver of appointed counsel, a fact of which she was unaware.

The State concedes that *Sutherland v. State, supra,* dictates an outcome in favor of Bradford on this issue but urges this court to overrule *Sutherland* on the basis that *Sutherland* does not accurately reflect the opinions of the United States Supreme

Court. We decline to do so. *Sutherland v. State* seems to fit squarely within the Supreme Court decisions on the issue of when the Sixth Amendment right to counsel attaches and the validity of subsequent *Miranda* waivers. *Michigan v. Jackson, supra,* holds that the Sixth Amendment right to counsel attaches when counsel is requested and a subsequent waiver of *Miranda* rights is of no consequence. We perceive no valid reason for not applying the same principle to situations where counsel has already been appointed. *Patterson v. Illinois, supra,* is distinguishable on its facts because in that case no counsel had been appointed by the court.

It should be noted that the Arkansas Court of Appeals has recently held that the mere appointment of counsel is not enough. Rather, there must be an affirmative invocation of the right to counsel in order to invalidate a later confession. *See Lanes v. State,* 54 Ark. App. 266, ___ S.W.2d ___ (May 22, 1996). That decision is in direct conflict with our decision today. Accordingly, we overrule *Lanes v. State* on that point.

We further note that Rule 8 of the Arkansas Rules of Criminal Procedure dictates a reversal in this case. Rule 8.2 provides that the trial court shall appoint counsel to represent an indigent defendant at the first appearance, if the right is not knowingly and intelligently waived. An appointment of counsel was made here. Rule 8.3 provides that upon the first appearance of the defendant before the judicial officer, and after the defendant is advised of his rights:

> No further steps in the proceedings other than pretrial release inquiry may be taken until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused assistance of counsel.

Thus, under our rule, an attorney for an indigent defendant should be appointed at the probable cause hearing, or the State must show that right to have counsel appointed at the hearing

was specifically waived. *See Sutton v. State*, 262 Ark. 492, 559 S.W.2d 16 (1977).

There is a third issue raised by Bradford in this case. Nevertheless, because it is somewhat speculative as to whether the issue of alleged trial court error in not giving a certain instruction -- AMCI2d 601 -- will reoccur on retrial, we will not address the point. Suffice it to say, that where any evidence to support an instruction is before the jury, that instruction must be given. *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995).

Reversed and remanded.

Dudley, J., not participating.

RULE 8.2. Appointment of Counsel.

(a) An accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable.

(b) Whenever an indigent accused is charged with a criminal offense and, upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel to represent him, the court shall appoint counsel to represent him unless he is charged with a misdemeanor and the court has determined that under no circumstances will imprisonment be imposed as a part of the punishment if he is found guilty.

(c) Attorneys appointed by municipal courts, city courts, police courts, and justices of the peace may receive fees for services rendered upon certification by the presiding judicial officer if provision therefor has been made by the county or municipality in which the offense is committed or the services are rendered.

Comment to Rule 8.2

This provision seeks to ensure compliance with constitutional requirements respecting the rights of indigent defendants to representation by counsel. It should not be construed to indorse or to criticize any existing or contemplated system designed to provide dcfense services.

1987 Unofficial Supplementary Commentary to Rule 8.2

Constitutional Requirements.

In *Sutton v. State,* 262 Ark. 492, 559 S.W.2d 16 (1977), no attorney was appointed for appellant at his first appearance. He confessed to burglary after almost three weeks' incarceration and after being advised by a postal inspector of *Miranda* warnings in connection with questioning about violations of

federal postal laws. Reversing and remanding, the Court found several deficiencies necessitating the exclusion of a confession, including a defective *Miranda* warning. Significantly, the opinion of the Court does contain language suggesting that Rule 8.2(a) and (b) have constitutional dimensions so that failure to comply with these provisions may result in exclusion of evidence if the state does not show that failure to comply was harmless. After quoting Rule 8.2(a) and (b) as well as Rule 8.3(b), the Court observed:

> The burden is clearly on the state to establish that [appellant] waived his rights. All doubts must be resolved in favor of the individual rights and *constitutional safeguards*....
>
> We cannot say in this case the state met the burden of proving that it complied with the Rules of Criminal Procedure.

Sutton at 495, 559 S.W.2d at 18 (emphasis added)(citations omitted).